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Mohannad Taha bin Ismail v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–281 OF 2011

LINTON ALBERT, MOHTARUDIN BAKI JJCA AND ZAWAWI SALLEH J (NOW JCA)

28 MARCH 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charged for murder — Murder of child — Accused convicted and sentenced to death — Deceased abused physically and sexually — Deceased died due to massive subdural hematoma due to violent shaking — Whether trial judge conducted maximum evaluation on prosecution's evidence — Whether prima facie case established — Whether defence case considered — Penal Code s 302

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The appellant and SP2, a single mother had became a couple and stayed together with her child from a previous marriage ('the child'). The appellant would beat the child when SP2 was at work. This came to the knowledge of SP2 as the child would complain to SP2. In fact, SP2 herself had witnessed the beatings and bruises. On the tragic day, SP2 left for work and received a call later from the appellant, threatening to punish the child as she had urinated uncontrollably. The appellant called SP2 again and informed her that the child was having some eyesight problem and could not see after hitting herself on the sliding door. On the third time the appellant called SP2, the child was in a coma. The appellant sounded panicky and said that he would come and fetch her in a taxi. It was later discovered that the child had stopped breathing. SP2 suggested that they should bring the child to the hospital but the appellant refused as he was afraid that he might be arrested and faulted for beating the child. However, he later relented and brought the child to the hospital but the child was pronounced dead when taken to receive treatment. Inspections carried out showed signs of bruises ranging from various colors on the forehead, arms, legs and body of the victim. There were also suggestions that the child was sexually abused. The child's cause of death was 'massive subdural hematoma due to violent shaking'. At the High Court, the appellant was convicted for the charge of murder, an offence under s 302 of the Penal Code and sentenced to death. Hence the present appeal. The appellant contended that that the learned trial judge misdirected himself when he failed to conduct a maximum evaluation on the evidence adduced by the prosecution and had the trial judge done so, he would have held that there was no prima facie case of murder. Alternatively, the appellant contended that the learned trial judge misdirected himself when he failed to appreciate the defence case. The complaint of the appellant was that there was no maximum evaluation of the

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evidence of SP2. The appellant submitted that the trial judge should have tested SP2's evidence from various angles.

Held, dismissing the appeal and affirming conviction and sentence of court below:

(1) The learned trial judge had tested SP2's evidence from various angles and directed his attention to the analysis of SP2's evidence. SP2 said she was not afraid that she would be charged with an offence of murder, but for making a false report. The learned trial judge has specifically addressed the issue of the false report made by SP2. Having considered the surrounding circumstances of the case, the learned trial judge accepted SP2's explanation. The impression as to SP2's demeanor was also critically tested against the totality of the evidence. As seen from the impugned judgment, the learned judge trial had carefully assessed, sifted, scanned, and scrutinised SP2's evidence before coming into conclusion that SP2 was a truthful witness. As an appellate court, the court should be very slow to disturb the finding of the trial judge on the credibility of witnesses as it was within the purview of the trial judge who had the audio visual advantage in assessing the witness (see paras 22–25).

(2) There was no dispute that the evidence adduced by the prosecution was wholly circumstantial in nature. However, there was sufficient evidence that proved the nexus between the accused and the death of the child as at the material time, the appellant was alone with the child. Medical evidence suggested that the shaking event occurred repeatedly within a week and the injury sustained could affect the urinary system and cause the victim to fall into unconsciousness. This was consistent with SP2's evidence that the child had complained to her a week prior to her death that the appellant had abused her. Since then, the child was having urinary problems. On that fateful day, the appellant informed SP2 that the child urinated uncontrollably and the child fallen into unconsciousness on that day. The appellant's conduct and his reluctance to bring the child to receive medical treatment were also relevant (see para 30).

(3) The prosecution had established via medical evidence and the autopsy report that the appellant had abused the child; there were 34 wounds, injuries, bruises found on various parts of the child's body; the child suffered from massive subdural haematoma due to violent shaking; the child was physically and sexually abused by the appellant; and traces of the appellant's spermatozoa was also found on the child's singlet (see para 32).

(4) The learned trial judge had considered and weighed the defence put up by the appellant adequately. The learned trial judge had viewed the whole

of the evidence objectively and from all angles. There was no serious non-direction which amounted to misdirection by the learned judge (see para 46).

[Bahasa Malaysia summary

Perayu dan SP2, seorang ibu tunggal telah menjadi pasangan dan tinggal bersama dengan anaknya daripada perkahwinan sebelumnya ('kanak-kanak tersebut'). Perayu akan memukul kanak-kanak tersebut apabila SP2 berada di tempat kerja. Ini kemudian diketahui oleh SP2 memandangkan kanak-kanak tersebut akan mengadu kepada SP2. Bahkan, SP2 melihat sendiri pukulan dan kesan lebam tersebut. Pada hari yang tragik tersebut, SP2 telah pergi ke tempat kerja dan kemudian menerima panggilan daripada perayu, yang mengugut untuk menghukum kanak-kanak tersebut kerana dia telah kencing dengan tidak terkawal. Perayu menelefon semula SP2 dan memberitahunya bahawa kanak-kanak tersebut mempunyai masalah mata dan tidak boleh melihat selepas terhantuk di pintu gelangsar. Pada kali ketiga perayu menelefon SP2, kanak-kanak tersebut telah berada dalam keadaan koma. Perayu kedengaran panik dan mengatakan bahawa dia akan datang dan mengambilnya dengan teksi. Kemudian, adalah didapati bahawa kanak-kanak tersebut telah berhenti bernafas. SP2 mencadangkan mereka membawa kanak-kanak tersebut ke hospital tetapi perayu enggan berbuat demikian memandangkan dia takut dia akan ditangkap dan disalahkan kerana memukul kanak-kanak tersebut. Walau bagaimanapun, dia kemudian mengalah dan membawa kanak-kanak tersebut ke hospital tetapi kanak-kanak tersebut telah diumumkan mati apabila menerima rawatan. Pemeriksaan yang dijalankan menunjukkan tanda-tanda lebam pelbagai warna di dahi, lengan, kaki dan badan mangsa. Terdapat juga kesan bahawa kanak-kanak tersebut telah didera secara seksual. Punca kematian kanak-kanak tersebut adalah 'massive subdural hematoma due to violent shaking'. Di Mahkamah Tinggi, perayu telah disabitkan dengan tuduhan membunuh, kesalahan di bawah s 302 Kanun Jenayah dan dihukum mati. Justeru rayuan ini. Perayu berhujah bahawa hakim bicara yang bijaksana telah salah arah apabila dia gagal menjalankan penilaian maksima terhadap keterangan yang dikemukakan oleh pihak pendakwaan dan sekiranya hakim bicara berbuat demikian, beliau akan memutuskan bahawa tiada kes membunuh prima facie. Secara alternatif, perayu berhujah bahawa hakim bicara bijaksana telah salah arah apabila dia gagal mengamati kes pihak pembelaan. Aduan oleh perayu adalah bahawa tidak terdapat penilaian maksima keterangan SP2. Perayu berhujah bahawa hakim bicara seharusnya menguji keterangan SP2 daripada pelbagai sudut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman mahkamah di bawah:

(1) Hakim bicara yang bijaksana telah menguji keterangan SP2 daripada pelbagai sudut dan memberikan perhatian beliau kepada analisa

keterangan SP2. SP2 menyatakan dia tidak takut disabit dengan kesalahan membunuh, tetapi kesalahan membuat laporan palsu. Hakim bicara yang bijaksana telah dengan spesifik mengendali isu laporan palsu oleh SP2. Setelah mempertimbangkan keadaan sekeliling kes, hakim bicara yang bijaksana telah menerima penjelasan SP2. Tanggapan tentang kelakuan SP2 juga telah diuji secara kritikal terhadap keterangan secara keseluruhan. Seperti yang dilihat daripada keputusan yang dipertikaikan, hakim bicara yang bijaksana telah dengan hati-hati menyelidik, menapis, mengimbas dan meneliti keterangan SP2 sebelum tiba kepada kesimpulan bahawa SP2 adalah saksi yang jujur. Sebagai mahkamah rayuan, mahkamah seharusnya teragak-agak untuk mengganggu dapatan hakim bicara mengenai kebolehpercayaan saksi-saksi memandangkan ia adalah dalam bidang kuasa hakim bicara yang mempunyai kelebihan audio dan visual dalam menilai saksi tersebut (lihat perenggan 22–25).

(2) Tidak terdapat sebarang pertikaian bahawa keterangan yang dikemukakan oleh pihak pendakwaan adalah bersifat ikut keadaan secara keseluruhannya. Walau bagaimanapun, terdapat keterangan yang mencukupi yang membuktikan pertalian antara tertuduh dan kematian kanak-kanak tersebut pada masa matan, perayu bersendirian dengan kanak-kanak tersebut. Keterangan perubatan mencadangkan bahawa kejadian mengoncang berlaku secara berulang selama seminggu dan kecederaan yang dialami akan menjejaskan sistem perkumuhan dan menyebabkan mangsa jatuh pengsan. Ini adalah konsisten dengan keterangan SP2 bahawa kanak-kanak tersebut mengadu dengannya selama seminggu sebelum kematiannya bahawa perayu telah menderanya. Sejak itu, kanak-kanak tersebut telah mengalami masalah perkumuhan. Pada hari kejadian, perayu memberitahu SP2 bahawa kanak-kanak tersebut tidak dapat mengawal kencingnya dan kanak-kanak tersebut jatuh pengsan pada hari tersebut. Kelakuan perayu dan keengganannya untuk membawa kanak-kanak tersebut untuk mendapatkan rawatan perubatan juga adalah relevan (lihat perenggan 30).

(3) Pihak pendakwaan juga telah membuktikan melalui keterangan perubatan dan laporan autopsi bahawa perayu telah mendera kanak-kanak tersebut; terdapat 34 luka-luka, kecederaan, lebam-lebam didapati di bahagian badan yang lain kanak-kanak tersebut; kanak-kanak tersebut telah mengalami subdural hematoma yang banyak disebabkan goncangan teruk; kanak-kanak tersebut juga didera secara fizikal dan seksual oleh perayu; dan kesan-kesan sperma perayu juga didapati di kemeja dalam kanak-kanak tersebut (lihat perenggan 32).

(4) Hakim bicara yang bijaksana juga telah mempertimbangkan pembelaan yang dikemukakan oleh perayu dengan berpatutan. Hakim bicara yang

bijaksana juga telah melihat keseluruhan keterangan secara objektif daripada pelbagai sudut. Tidak terdapat sebarang salah arah yang serius yang membawa kepada salah arah oleh hakim yang bijaksana tersebut (lihat perenggan 46).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)
Chan Kwee Fong v PP [2010] 1 MLJ 441, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Pendakwa Raya lwn Khairul Adli bin Ramli dan lain-lain [2007] 6 MLJ 754, HC (refd)
PP v Abd Razak bin Dalek [2007] 2 MLJ 255, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
Virsa Singh v The State of Punjab AIR 1958 SC 465, SC (refd)

Legislation referred to

Penal Code ss 300(c), 302

Appeal from: Criminal Trial No 45B-17 of 2010 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik) for the appellant.
J Kuldeep Kumar (J Kuldeep Kumar & Co) for the appellant.
Munahyza Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

THE ANTECEDENTS

[1] The appellant was charge with the following offence:

Bahawa kamu, pada 12 Oktober 2009 jam antara 7.30 petang sehingga 8.30 malam, di Tower 9/D3/9 Palazzo Tower, Venice Hill Condominium, Batu 9 Cheras, di dalam daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, telah membunuh Aaliyah Ayman Hussin binti Abdullah (MyKid No.: 061129-16-0048) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The appellant was tried at the Shah Alam High Court. At the end of defence case, the appellant was convicted and sentenced to death. Hence this appeal.

[3] We have heard learned counsel for the appellant and learned deputy public prosecutor. We have scrutinised the entire evidence adduced before the High Court. We unanimously dismissed the appeal and affirmed the conviction and sentence passed by the High Court.

[4] We now give the reasons for our decision.

FACTS OF THE CASE

[5] Ellina Mualad Mahather ('SP2') is the natural mother of the deceased child, who was born on 27 September 2006. SP2 was earlier married to one Ayman Hussin Mahmod. After their divorce, SP2 and the appellant became a couple, and they stayed together with the deceased child.

[6] At the beginning, the relationship between the appellant and the child was good. The child used to call the appellant 'Baba'. Things changed when the appellant started to beat the child, sometimes with his hand, sometimes with clothes hanger or a ruler. The beatings took place when SP2 was at work. When SP2 returned from work, the child would complain to her, and she had seen bruises on the child's body. SP2 also witnessed the appellant beating the child during Saturdays and Sundays, when she was not working. SP2 tried to put a stop to the abuse but was scolded by the appellant. The appellant also prevented SP2 from taking the child to the hospital.

[7] At the material time, they were staying in a condominium at Tower 9. SP2 was working as an administration executive at JPZ Construction & Engineering Sdn Bhd whilst the appellant was a drop-out from Lim Kok Wing University. While she worked, the appellant cared for the child.

[8] A week before the tragedy, the child complained to SP2 that the appellant had beaten her. SP2 observed that there were bruises on the child's face and her head was swollen. After the incident, the child was having urinary problems.

[9] On 12 October 2009, SP2 left for work at 5.30am Before she left the house, SP2 observed that her daughter was lying on the sofa and was drinking milk. Her physical condition was fine except for some old injuries on the face and head that were almost healed. At about 11.30am, SP2 received a call from the appellant. The appellant complained angrily and the child urinated uncontrollably and he would punish her. SP2 told the appellant to ignore it.

[10] At about 2.30pm, the appellant called SP2 and informed her that the child was having some eye-sight problem as she could not see. The appellant also told SP2 that the child had hit herself on the sliding door. The appellant said he would go to the security guard to borrow a torchlight to check on her eyes. SP2 told the appellant to call later as she was not free.

[11] At about 4.30pm, the appellant called again, this time to say that the child was in coma. The appellant sounded panicky and the appellant said that he would come and fetch her in a taxi. At the same time SP2 had asked her employer to leave early. The appellant came to SP2's office at 5.30pm and they went to Giant to buy pampers.

[12] They returned home at about 7.30pm. On arrival, SP2 saw that the child was in a serious condition as she was having difficulty in breathing and several injuries on her face. Sadden, both SP2 and the appellant started crying.

[13] After about 20 minutes, the child stopped breathing. The appellant then tried to perform CPR to revive the child but to no avail. SP2 suggested that they should bring the child to the hospital but the appellant refused. He was afraid that he might be arrested and faulted for beating the child.

[14] SP2 suggested that they blamed the Indonesian maid for harming the child. The appellant finally relented and they rushed the child to the Kajang Hospital.

[15] The child was brought to the emergency ward but was pronounced dead. According to Dr Rageswary Marappan ('SP9'), the initial examination showed that the child was already dead when taken to receive treatment. Further inspections showed signs of bruises ranging from various colours on the forehead, arms, legs and body of the victim. She also found evidence that the child could have been sexually abused.

[16] Autopsy on the victim's body was performed by the pathologists, Dr Abdul Karim bin Hj Tajudin ('SP3'). He confirmed that the child's cause of death was 'massive subdural haematoma due to violent shaking'.

THE APPELLANT'S APPEAL

[17] Before this court, the appellant canvasses the following grounds in his appeal:

(a) that the learned trial judge misdirected himself when he failed to conduct

a maximum evaluation on the evidence adduced by the prosecution. Had he done so he would have held that there is no prima facie case of murder; and

(b) alternatively, the learned trial judge misdirected himself when he failed to appreciate the defence case.

[18] The learned deputy public prosecutor has refuted the contentions of the learned counsel for the appellant. The respondent submitted that the appeal filed by the appellant herein should be dismissed and the conviction and sentence under s 302 of the Penal Code passed by the High Court should be affirmed.

[19] We will discuss each of the grounds of appeal in turn.

Ground (a): There is no prima facie case of murder

[20] The prosecution's case was anchored on the evidence of SP2. The complaint of the appellant is that there is no maximum evaluation of the evidence of SP2. The appellant submitted that the trial judge should have tested SP2's evidence from various angles ie:

(a) motive;

(b) the fact that SP2 had lied in her police report (exh P9); and

(c) SP2 had only complained of the alleged abused by the appellant for the first time when she was desperate because she was the real abuser of the child.

[21] With respect, the court could not accept the contention. We have carefully scrutinised the records and find that the learned trial judge had in his judgment, tested SP2's evidence from various angles.

[22] From pp 425–427 of the appeal records, the learned trial judge had directed his attention to the analysis of SP2's evidence. SP2 said she was not afraid that she will be charged with an offence of murder, but for making a false report.

[23] We noted that the learned trial judge has specifically addressed the issue of the false report (exh P9) made by SP2. The learned trial judge found that the prosecution had come clean when SP2 admitted in examination-in-chief that she made a false report. SP2 gave various reasons for having done so:

(a) she felt pressured when the report was made;

(b) she was fearful as she does not know the actual cause of her daughter's injuries;

(c) she had to come up with the idea that the maid had beaten child to convince the appellant from allowing her to bring the child to the hospital; and

(d) she was confused and she still cared for the appellant. She was worried that the appellant will be arrested and their lives will be affected.

[24] The learned trial judge, after having considered the surrounding circumstances of the case, accepted SP2's explanation. The impression as to the SP2's demeanour was critically tested against the totality of the evidence. As can be seen from the impugned judgment, the learned judge trial had carefully assessed, sifted, scanned, and scrutinised SP2's evidence before coming into conclusion that SP2 was a witness of truth:

> 22. Mahkamah mendapati SP2 telah bercakap benar atas alasan-alasan mengapa dia melaporkan P9 itu. SP2 tidak berbohong seperti terperangkap membohong semasa memberi keterangan semasa prosiding mahkamah. SP2, antara lainnya, (seperti di atas), memberi alasan apa sebenarnya yang dia takut, iaitu kerana telah membuat laporan polis palsu. SP2 tidak takut jika dituduh di bawah s 302 Kanun Keseksaan, tentu sekali kerana dia tidak mencederakan anaknya sendiri. OKT berperanan telah menghasilkan SP2 membuat laporan P9 seperti itu. OKT mengambil bahagian lebih berpengaruh dan SP2 berbuat demikian dalam keadaan begitu takut dan amat panik, memandangkan juga, dia (SP2) masih menyayangi OKT pada masa itu.
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> 23. Setelah meneliti secara maksimum mengapa alasan laporan palsu telah dibuat oleh SP2, mahkamah mendapati ia beralasan yang boleh diterima mengapa ia telah dibuat begitu (seperti yang disebut di atas). Keterangan SP2 didepankan awal-awal lagi dalam pemeriksaan awal SP2 dan tidak disembunyikan sama sekali. la bukanlah berbentuk satu pembohongan yang SP2 terperangkap semasa memberi keterangan. la juga bukanlah satu percanggahan yang boleh merosakkan keterangan SP2. Kalau ada pun percanggahan (yang mana mahkamah tidak mendapatinya), ia tidak boleh menjadikan SP2 seorang pembohong (*Khoo Chye Hin v Public Prosecutor* [1961] 27 MLJ 105; *Mohd Alias v Public Prosecutor* [1983] 2 MLJ 172; *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234; *Che Omar Mohd Akhir v Public Prosecutor* [1999] 2 CLJ 780).
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> 24. Mahkamah telah memerhati sedekat-dekatnya perilaku (*demeanour*) SP2 dan membuat pendapat SP2 tidak mirip sedikit pun untuk berbohong atau dia sememangnya bukanlah seorang pembohong dalam memberi keterangan di mahkamah. Keterangannya adalah satu jeritan atau tempekan kebenaran rentetan peristiwa yang berlaku satu persatu, malah alasan-alasan bagi laporan P9 dizahirkan dan tidak dipendam. Keterangan SP2 adalah satu tangisan seorang ibu di mahkamah keadilan atas

perbuatan OKT. Mahkamah membuat pendapat sedemikian dalam pemerhatiannya ke atas keterangan SP2 secara menyeluruh.

(See pp 427–428, appeal records).

[25] As an appellate court, we should be very slow to disturb the finding of the trial judge on the credibility of witnesses as it is within the purview of the trial judge who has the audio visual advantage in assessing the witness (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 and *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15).

[26] The pathologist ('SP3') has described the cause of death as 'massive subdural haematoma due to violent shaking'. The appellant contented that the learned trial judge had misdirected himself when he failed to appreciate that there is no evidence by SP2 of SP12 (grandfather of the deceased child) to show that the appellant had at any point of time violently shaken the child. There was indeed no maximum evaluation.

[27] In this instant case, there is no dispute that the evidence adduced by the prosecution is wholly circumstantial in nature. The law on circumstantial evidence is clear. In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, the Federal Court stated that:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman and Ors v Public Prosecutor* [1982] 2 MLJ 306 at p 310).

[28] In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, the Federal Court discussed the status of circumstantial evidence and stated that:

> The entire prosecution case rested on circumstantial evidence …
>
> The question, therefore, is whether the prosecution proved the guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established.
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> … The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. … In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established …

A … If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt. … There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the B guilt of the accused …

… In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

C

[29] It is clear from the case cited above the circumstantial evidence that proves the guilt of the accused must be fully established by the prosecution. Such evidence must show that only the appellant had committed or carried out D an act or several acts that had caused the death of the child.

[30] In the instant case, having carefully examined the evidence, we are in agreement with the learned trial judge that there are sufficient evidence that proved the nexus between the accused and the death of the child. The evidence E may be summarised as follows:

(a) at the material time, the appellant was alone with the child;

(b) according to SP3, the shaking event occurred repeatedly within a week. The injury sustained could affect the urinary system and caused the F victim to fall into unconsciousness;

(c) this was consistent with SP2's evidence that the child had complained to her a week prior to her death that the appellant had abused her. Since then, the child was having urinary problems;

G (d) on that fateful day, the appellant informed SP2 that the child urinated uncontrollably;

(e) the child fallen into unconsciousness on that day; and

(f) the appellant's conduct and his reluctance to bring the child to receive H medical treatment were also relevant.

[31] It is trite that to succeed in any murder trial by relying on s 300(c) of the Penal Code, the prosecution must established that:

I (a) the death of the deceased;

(b) the death was caused by the accused;

(c) he intended to bodily injury sufficient in the ordinary cause of nature to cause death

(see *Virsa Singh v The State of Punjab* AIR 1958 SC 465; *Public Prosecutor v Abd Razak bin Dalek* [2007] 2 MLJ 255; *Pendakwa Raya lwn Khairul Adli bin Ramli dan lain-lain* [2007] 6 MLJ 754 and *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441).

[32] In the instant case, we found that the prosecution had established via SP3's evidence and the autopsy report (exh P30) that:

(a) the appellant had abused the child;

(b) there were 34 wounds, injuries, bruises found on various parts of the child's body;

(c) the child suffered from massive subdural haematoma;

(d) it was due to violent shaking, and she was physically and sexually abused by the appellant; and

(e) traces of the appellant's spermatozoa was also found on the child's singlet (exh P11).

[33] After having carefully scrutinised the evidence in its entirety, we are in agreement with the learned trial judge that the intention to cause bodily injuries could not be accidental or unintentional. The trial judge had fully considered the circumstantial evidence that existed in this case and had subjected them to a maximum evaluation. We have no reason to disturb His Lordship's finding.

Ground (b): The learned trial judge had failed to appreciate the defence's case

The defence case

[34] The appellant gave his own version of events that took place on 12 October 2009. SP2 left for work between 6–7am in the morning. He denied having called SP2 at about 11.30am to complain that the child had urinated as the child was wearing pampers all the time.

[35] On the same morning, the child hit her head to the master bedroom's door knob. At about 12 noon, the appellant prepared milk for her but she told the appellant that she could not see. The child did not response to the light when the appellant checked her eye-sight with a torchlight which he borrowed from the guardhouse.

[36] The appellant then called SP2 and told her that the child could not see and wanted to take her to the hospital. SP2 did not allow because the appellant

had no money, he was not the biological father and he had overstayed in Malaysia without valid identification documents.

[37] The appellant then went to the guard house again attempted to sell his mobile phone to raise some money but could not do so.

[38] The appellant then called SP2 informing her that the child was in coma and asked her to come back quickly. The appellant then took a taxi to fetch SP2. On the way back SP2 wanted to stop at Giant to buy pampers.

[39] When they returned home, the child was lying on a sofa. The appellant wanted to take her to the hospital and was again refused by SP2. The appellant then went to take his shower. 15 minutes later, SP2 cried out saying 'my daughter died'. Both SP2 and the appellant performed CPR to revive the child but failed. He placed two fingers on the child's chest while pressing. According to the appellant, it was done gently.

[40] The child was then rushed to the hospital but was pronounced dead on arrival.

[41] The appellant agreed that the police report to be lodged in the manner suggested by SP2 then only the child be brought to the hospital. He denied causing the child's death. The appellant said he never abused the child and it was SP2 who was abusing the child.

[42] The appellant narrated that SP2 had beaten the child when they were staying at Tower 33. SP2 hit the child's back using a mopping stick, and hit the child's genital area using a towel.

[43] The appellant's evidence, when tested against the prosecution's evidence, is in conflict with, or outweigh by, the proved facts of the case. Our reasons are as follows:

(a) the appellant stated that SP2 had beaten the child when they were staying at Tower 33. Yet SP12 who was also staying together with them when the alleged beatings took place stated in the affirmative that SP2 had never abused the child;

(b) the allegation that SP2 hit the child with a mopping stick and the towel was also rebutted by SP3's evidence. The pathologist stated that the injuries found on the child's back could only be caused by fist punches. The injury on the child's pubic was caused by someone pressing a finger into her genital area;

(c) the appellant said that the child hit the doorknob of the master bedroom.

The photograph (exh P6(13)) showed that it was a pointed doorknob in the shape of a 'x'. The appellant's narration was totally inconsistent with the actual injury sustained by the child (see photograph exh P8(B)) as the pathologist stated that the injury was caused by the knuckle;

(d) further, ASP Zuraimi ('SP13'), the forensic officer also could not find any blood stain on any part of the bedroom door; and

(e) the fact that the CPR was done gently was also rebutted by SP3's evidence. The pathologist stated that the fracture on the child's fifth and sixth rib was caused by severe pressure applied during CPR.

[44] Another issue to be addressed is the appellant's weak disposition and his unreasonable behaviour. Based upon the appellant's narrative, he could not bring the child to the hospital because SP2 forbid him to do so. If he was genuine to bring the child to seek medical treatment, he would not have left the child unattended when he fetched SP2 from her office. The appellant also agreed with the prosecution that he could have brought the child along when he fetched SP2 from the office, and they could go straight to the hospital.

[45] The above conduct has greatly affected the probability of the appellant's version of the case, especially his main defence that his relationship with the deceased child was good and he never abused the child.

[46] We are satisfied that the learned trial judge has considered and weighed the defence put up by the appellant adequately. The learned trial judge has viewed the whole of the evidence objectively and from all angles. There is no serious non-direction which amounts to a misdirection by the learned judge.

[47] As can be seen from the grounds of judgment, the learned trial judge has considered the relevant evidence adduced at the trial, evaluated the relevant circumstances and assessed the credibility of the witnesses before arriving at the conclusion that the prosecution has established its case beyond reasonable doubt and the appellant has failed to raised a reasonable doubt on the prosecution's case.

[48] From what has been discussed above, the appeal is not impressed with merit. The appellant was rightly convicted and sentenced. In the result, we dismissed the appeal and affirmed the conviction and sentence passed by the High Court.

Appeal dismissed and conviction and sentence of court below affirmed.

Reported by Afiq Mohamad Noor